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THE HEALTH CARE CASES AND THE NEW MEANING OF COMMANDEERING*

BRADLEY W. JOONDEPH**

The Supreme Court's decision in the Health Care Cases to sustain the central provisions of the Affordable Care Act ("ACA") was hugely important in several ways. Most commentators have focused on the Court's upholding of the ACA's minimum coverage provision. But the Court's Medicaid holding—that the ACA coerced (and thus commandeered) the states by making their preexisting Medicaid funds contingent on the states expanding their programs—may actually be more significant as a matter of constitutional law.

The thesis of this Article is that, in finding the ACA's Medicaid expansion provisions coercive, the Court has re-conceptualized what constitutes a federal "command" to the states, and thus re-defined the scope of the anti-commandeering principle. The Court's holding means that federal laws can constitute commands even when they do not legally compel the states to act. The relevant inquiry is now practical rather than formal: has Congress left the states with a "real option" of saying no to the federal government's conditions? This is an important shift. Not only does it potentially jeopardize a range of federal spending programs, but it also affects laws operating on the states as "conditional prohibitions"—federal statutes conditionally preempting state law. Until now, such statutes have been considered fully consistent with the anti-commandeering doctrine because they do not formally require the states to act. But the Health Care Cases upend this understanding. If, as a practical matter, the states have no "genuine choice" but to govern on a

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particular subject, Congress’s conditions specifying how that subject must be governed (to avoid federal preemption) may well amount to unconstitutional commandeerings.

This new understanding could be particularly troubling in the field of state and local taxation. The number, complexity, and heterogeneity of state and local tax systems almost certainly impose a number of unnecessary costs on the American economy. And as the Court itself has long recognized, Congress is much better suited institutionally than the judiciary to address these problems. An anti-commandeering doctrine that disempowers Congress from enacting laws that meaningfully regulate state taxation would be unfortunate.

INTRODUCTION813

I. THE ANTI-COMMANDEERING PRINCIPLE (AND ITS LIMITS)818

 A. *The Central Idea*818

 B. *States in Their Sovereign and Proprietary Capacities*819

 C. *Prohibitions and Commands to Act*820

 D. *Commands, Enticements, and Coercion*822

II. THE HEALTH CARE CASES825

 A. *The ACA’s Expansion of Medicaid*.....826

 B. *The Supreme Court’s Medicaid Holding*.....828

III. THE NEW MEANING OF COMMANDS (AND COMMANDEERING)832

IV. A CASE STUDY: THE FEDERAL REGULATION OF STATE TAXATION836

 A. *State and Local Taxation in the United States*.....837

 B. *Applying the New Understanding*841

 C. *Taxation and Governance*.....844

 D. *Some Practical Consequences*845

 1. *Disadvantaging Interstate Commerce*846

 2. *Locational Distortions*846

 3. *Undertaxation and the Underproduction of Public Goods*.....846

 4. *Planning and Compliance Costs*847

CONCLUSION849

INTRODUCTION

The Supreme Court's decision in *National Federation of Independent Business v. Sebelius*¹ (better known as the "*Health Care Cases*") is easily the most important the Court has handed down since John Roberts became Chief Justice in 2005, and it may prove one of the most significant in the Court's history. In upholding the central provisions of the Patient Protection and Affordable Care Act ("ACA"), the Court effectively ratified the most important federal statute in two generations.² Assuming it is fully implemented, the ACA could transform the delivery and financing of health care in the United States, a sector comprising nearly one-fifth of the American economy.³ Further, once the Act goes into full effect, it will make access to health coverage for all Americans—regardless of income, health, or job status—a permanent component of our basic social contract.⁴ As such, the ACA may soon become a fixed stone in our constitutional foundation—something akin to Social Security, Medicare, or the Civil Rights Act of 1964—with which all viable political movements (and constitutional theories) will need to come to terms.⁵

1. 132 S. Ct. 2566 (2012).

2. See Jack M. Balkin, *The Court Affirms Our Social Contract*, THE ATLANTIC (June 29, 2012, 5:00 PM), <http://www.theatlantic.com/national/archive/2012/06/the-court-affirms-our-social-contract/259186/> ("The Patient Protection and Affordable Care Act of 2010 made the most significant change to the American social contract since the Great Society programs of the 1960s.").

3. See, e.g., INST. OF MED. OF THE NAT'L ACADS., *THE FUTURE OF NURSING: LEADING CHANGE, ADVANCING HEALTH* 2 (2011) ("The ACA represents the broadest changes to the health care system since the 1965 creation of the Medicare and Medicaid programs and is expected to provide insurance coverage for an additional 32 million previously uninsured Americans."); David Gamage, *Perverse Incentives Arising from the Tax Provisions of Healthcare Reform: Why Further Reforms Are Needed to Prevent Avoidable Costs for Low and Moderate Income Workers*, 65 TAX L. REV. 669, 669–70 (2012) ("[T]he ACA is the most extensive reform to the U.S. healthcare system since the creation of Medicare and Medicaid in 1965.").

4. See Ronald Dworkin, *A Bigger Victory Than We Knew*, N.Y. REV. BOOKS, Aug. 16, 2012, at 6, available at <http://www.nybooks.com/articles/archives/2012/aug/16/bigger-victory-we-knew/>; Joey Fishkin, *A Massive Victory for Liberalism*, BALKINIZATION (June 29, 2012, 3:40 AM), <http://balkin.blogspot.com/2012/06/massive-victory-for-liberalism.html>.

5. See Barry Friedman, *Obamacare and the Court: Handing Health Policy Back to the People*, FOREIGN AFF., Sept.–Oct. 2012, at 87, 97 ("If . . . Obama wins a second term, then the health-care law will likely become entrenched alongside long-standing social welfare programs such as Social Security and Medicare."); Balkin, *supra* note 2; Fishkin, *supra* note 4; cf. Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1742 (2007) (describing the phenomenon by which certain "landmark statutes" become quasi-constitutional in nature, in that they shape interpretations of the Constitution as much as the text itself).

Most commentary has focused on that part of the decision sustaining the ACA's minimum coverage provision (or "individual mandate") as a valid exercise of Congress's taxing power.⁶ But there was another important question presented, one that may actually have been more significant as a matter of constitutional law: whether the ACA's substantial expansion of the Medicaid program was within Congress's spending power.

Medicaid is the joint federal-state spending program that provides health insurance to the indigent and the disabled. A state's participation in the program is voluntary, but once a state opts in, it must adhere to various federal statutory and administrative regulations.⁷ The ACA adds to these regulations—most notably, by requiring states, beginning in 2014, to extend coverage to all adults under the age of sixty-five with incomes up to 133% of the federal poverty level.⁸ The federal government will fund most of this coverage expansion, but not all of it.⁹ Thus, the ACA increases the minimum cost to a participating state, and by a considerable amount.

The twenty-six state plaintiffs claimed that, by making the states' preexisting Medicaid funding contingent on their willingness to expand their Medicaid programs, the ACA's conditions are coercive, and hence a "commandeering"—an unconstitutional command to the states to govern according to Congress's direction.¹⁰ In the *Health*

6. See, e.g., Abigail R. Moncrieff, *Understanding the Failure of Health-Care Exceptionalism in the Supreme Court's Obamacare Decision* (Bos. Univ. Sch. of Law Pub. Law Research Paper No. 12-37, 2012), available at <http://ssrn.com/abstract=2109396>; Robin West, *Justice Roberts' America* (Georgetown Univ. Law Ctr. Pub. Law and Legal Theory Research Paper No. 12-112, 2012), available at <http://ssrn.com/abstract=2120523>; Balkin, *supra* note 2; Richard A. Epstein, *Taxation and Regulation Under the Health Care Act*, SCOTUSBLOG (June 28, 2012, 12:05 PM), <http://www.scotusblog.com/2012/06/taxation-and-regulation-under-the-health-care-act/>; Fishkin, *supra* note 4; Michael Stokes Paulsen, *The Power to Destroy*, PUB. DISCOURSE (Aug. 8, 2012), <http://www.thepublicdiscourse.com/2012/08/6096>; Ilya Shapiro, *We Won Everything but the Case*, SCOTUSBLOG (June 29, 2012, 9:38 AM), <http://www.scotusblog.com/2012/06/we-won-everything-but-the-case/>.

7. See 42 U.S.C. § 1396c (2006); *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 502 (1990); *Harris v. McRae*, 448 U.S. 297, 301 (1980).

8. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 2001(a)(1), 124 Stat. 119, 271 (2010) (codified at 42 U.S.C. § 1396a (2006 & Supp. 2010)); Health Care and Education Reconciliation Act, Pub. L. No. 111-152, § 1004, 124 Stat. 1029, 1034-36 (2010) (codified at 42 U.S.C. § 1396a (2006 & Supp. 2010)).

9. See Health Care and Education Reconciliation Act, Pub. L. No. 111-152, § 1201, 124 Stat. 1029, 1051 (2010).

10. See Brief of State Petitioners on Medicaid at 24-53, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (No. 11-400).

Care Cases, seven Justices agreed.¹¹ Chief Justice Roberts's controlling opinion explained that, to be sure, Congress could require the states to adhere to the ACA's conditions in order to qualify for the ACA's *new* funding for Medicaid expansion.¹² But Congress could not require the states to participate in the ACA's "new program" on pain of losing their funding for the *existing*, pre-ACA Medicaid program—a program the Justices characterized as separate and distinct.¹³ Threatening states with the loss of their existing Medicaid funding streams—funds constituting, on average, more than ten percent of a state's annual budget—"is much more than 'relatively mild encouragement'—it is a gun to the head."¹⁴ Because the Act offered the states no "genuine choice"¹⁵ or "real option"¹⁶ other than to implement the ACA's Medicaid expansion, reasoned the Chief Justice, it " 'require[d] the States to govern according to Congress' instructions,' " violating the structural principles of federalism.¹⁷

The thesis of this Article is that, in finding the ACA's Medicaid expansion provisions coercive, the Court has effectively reconceptualized what constitutes a federal *command* to the states, and consequently re-defined the scope of the anti-commandeering principle. Previously, the Court had invalidated federal statutes as commandeering only when those statutes formally compelled the states to govern in a particular fashion.¹⁸ But an implicit premise of the *Health Care Cases* is that federal laws can constitute commands even when they do not legally require the states to act. The relevant inquiry is now *practical* rather than formal. What matters is whether Congress has left the states with a "real option" of saying no to the federal government's conditions.

This is an important shift. As many commentators have recognized, the Court's decision potentially jeopardizes a range of

11. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2601–08 (opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.); *id.* at 2656–68 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

12. *Id.* at 2607 (opinion of Roberts, C.J.) ("Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use.").

13. *Id.*

14. *Id.* at 2604 (quoting *South Dakota v. Dole*, 483 U.S. 203, 211 (1987)).

15. *Id.* at 2607.

16. *Id.* at 2605.

17. *Id.* at 2602 (quoting *New York v. United States*, 505 U.S. 144, 162 (1992)).

18. See, e.g., *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York*, 505 U.S. at 174–77.

federal spending programs.¹⁹ If the relevant federal enticements leave the states with no practical choice but to conform to Congress's instructions—as in the case of the ACA's Medicaid provisions—the conditions attached to that largesse must now be seen as commands. But the implications go further, beyond the scope of spending legislation. This new meaning of commandeering also affects federal laws operating on the states as conditional prohibitions—statutes that conditionally preempt state law. Such statutes are quite common in the United States Code,²⁰ and they offer the states a choice of affirmatively governing according to a specific set of federal instructions or having their laws on the subject preempted.²¹

Until now, federal statutes conditionally preempting state law have been considered simpatico with the anti-commandeering doctrine, as they do not legally *compel* the states to act.²² States that dislike the federal government's specified terms can simply step aside and do nothing, allowing the federal government to regulate the subject itself. The *Health Care Cases* upend this understanding. The fact that a federal statute offers the states the formal option of stepping aside is no longer sufficient, in itself, to immunize that statute from a commandeering challenge. If, as a practical matter, states have no real choice but to govern on that subject, then Congress's conditions amount to commands “in fact,” and thus violate the anti-commandeering doctrine.

How much might this matter? At this point it is unclear. Much depends on how the Court defines the concept of “genuine choice,” a point left vague by the *Health Care Cases*. But no matter how this standard is fleshed out, one place this new understanding could have an immediate impact is in the field of state and local taxation.

19. See, e.g., Jonathan Adler & Nathaniel Stewart, *The Line that Held: Why the Commerce Clause Ruling Matters*, NAT'L REV., July 30, 2012, at 14, 15 (“Given how often Congress seeks to use the spending power, the Court's decision may open a new front in the war to reinvigorate constitutional federalism, and occasion a reexamination of statutes from No Child Left Behind to the Clean Air Act.”); Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB 3* (Aug. 2012) (unpublished manuscript) (on file with the *North Carolina Law Review*).

20. They include, for example, such prominent laws as the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6929 (2006); the Clean Water Act, 33 U.S.C. § 1370 (2006); and the Occupational Safety and Health Act of 1970, 29 U.S.C. § 667 (2006). See *New York*, 505 U.S. at 167–68.

21. See *New York*, 505 U.S. at 167.

22. See *id.* (“[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.”); *Fed. Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 764–65 (1982); *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981).

States and their political subdivisions impose all sorts of taxes that affect interstate commerce, and the Supreme Court has long held that the Commerce Clause grants Congress the authority to regulate how these taxes are imposed.²³ Like other federal statutes that do not formally require the states to act, these statutes have never been judged to violate the anti-commandeering principle—even when they prescribe how particular state taxes are to be imposed—presumably because they afford states the formal option of not imposing the regulated tax at all. But states must raise revenue to exist. And because they rely (to greater and lesser degrees) on the specific levies they presently impose, the states may lack any practical choice but to continue imposing them. (Indeed, the financial consequences to a state in forgoing a particular tax could be more severe than withdrawing from Medicaid.) Hence, federal laws specifying the terms on which the states may implement such taxes, though not formally requiring the states to impose them, may now constitute impermissible commandeering.

This would be unfortunate. The number, complexity, and heterogeneity of state and local tax systems likely impose a number of unnecessary costs on the American economy.²⁴ And as the Court itself has long recognized, Congress is better suited institutionally than the judiciary, through its rather clumsy enforcement of the dormant Commerce Clause, to address these complex problems.²⁵

This Article proceeds in four parts. Part I provides some background concerning the relevant points of constitutional law—namely, the precise metes and bounds of the anti-commandeering principle. Next, Part II sets out the details of the Supreme Court's Medicaid holding in the *Health Care Cases*. Part III then explains how this holding has effectively re-conceptualized the meaning of federal commands to state governments, and thus extended the reach of the anti-commandeering principle. Finally, Part IV presents the federal

23. See, e.g., *Quill Corp. v. North Dakota*, 504 U.S. 298, 318 (1992); *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 280 (1978); JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, *STATE TAXATION* ¶ 4.24 (3d ed. 2010) ("Congress possesses unquestioned power under the Commerce Clause to regulate state taxation of interstate commerce."); *infra* Part IV.A.

24. See Daniel Shaviro, *An Economic and Political Look at Federalism in Taxation*, 90 MICH. L. REV. 895, 898–930 (1992); *infra* Part IV.C.

25. See, e.g., *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 637–38 (1981) (White, J., concurring); *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 476 (1959) (Frankfurter, J., dissenting); *McCarroll v. Dixie Greyhound Lines*, 309 U.S. 176, 188–89 (1940) (Black, J., dissenting); JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, *STATE AND LOCAL TAXATION: CASES AND MATERIALS* 205–08 (8th ed. 2005).

regulation of state and local taxes as a case study, illustrating how the new meaning of commandeering may entail some troubling practical consequences.

I. THE ANTI-COMMANDEERING PRINCIPLE (AND ITS LIMITS)

A. *The Central Idea*

It is well settled that Congress lacks the power to command the states (or their political subdivisions) to govern their residents in a particular fashion.²⁶ As the Supreme Court has explained, any such “commandeering” of state governments is “inconsistent with the federal structure of our Government established by the Constitution.”²⁷ Two decisions from the 1990s, *New York v. United States*²⁸ and *Printz v. United States*,²⁹ cemented this principle into constitutional doctrine (though arguably the rule predates those decisions considerably).³⁰

In *New York*, the Court struck down the so-called “take title” provision of the Low-Level Radioactive Waste Policy Amendments of 1985, which had directed the states either (a) to regulate low-level radioactive waste “according to the instructions of Congress,” or (b) to accept title to all such waste generated within their borders (an

26. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (opinion of Roberts, C.J.) (“[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.” (quoting *New York*, 505 U.S. at 162 (1992))); ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 3.9 (3d ed. 2006); KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 142 (17th ed. 2010); Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1642 (2006).

27. *New York*, 505 U.S. at 177.

28. 505 U.S. 144 (1992).

29. 521 U.S. 898 (1997).

30. See *id.* at 921–22; *New York*, 505 U.S. at 161–66; *Fed. Energy Regulatory Comm’n v. Mississippi*, 456 U.S. 742, 765 (1982) (upholding the Public Utility Regulatory Policies Act (“PURPA”) in part on the ground that there was “nothing in PURPA ‘directly compelling’ the States to enact a legislative program”); *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981) (holding that the challenged statute was constitutional because there was “no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program”); see also *South Carolina v. Baker*, 485 U.S. 505, 513 (1988) (concluding that the claim left open in *Federal Energy Regulatory Commission*—“that the Tenth Amendment might set some limits on Congress’ power to compel States to regulate on behalf of federal interests”—was not squarely presented); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985) (declining to “identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause”); *Coyle v. Smith*, 221 U.S. 559, 565 (1911) (invalidating an act of Congress that, on condition of admission to the Union, dictated that Oklahoma’s state capital be located in a particular city for a specified period of years).

enormous financial liability).³¹ The Court held that “[e]ither type of federal action would ‘commandeer’ state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution’s division of authority between federal and state governments.”³² Similarly, the Court in *Printz* invalidated an interim provision of the Brady Handgun Violence Prevention Act that directed state or local Chief Law Enforcement Officers to conduct background checks on persons seeking to purchase handguns.³³ Summarizing its holding in plain terms, the Court declared that the “Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”³⁴

Though important—perhaps even foundational—this anti-commandeering principle is narrower than might first appear. There are three important limits to its reach: (1) it only applies to federal laws regulating the states in their sovereign capacities, as regulators or governors of their inhabitants; (2) it only forbids federal laws that require the states to take affirmative acts, not those merely prohibiting state action; and (3) it does not forbid Congress from enticing the states to regulate or govern in particular ways, even if Congress could not command the states to do the same. The remainder of this Part explains these limits in turn.

B. States in Their Sovereign and Proprietary Capacities

A critical limit on the anti-commandeering principle is that it only forbids federal laws that dictate how a state *regulates* or *governs*.³⁵ It does not address the scores of federal laws that regulate the states’ behavior in other roles, such as when they act as employers, proprietors, or polluters.³⁶ So-called “generally applicable legislation”—like the Fair Labor Standards Act (“FLSA”),³⁷ which imposes minimum-wage and maximum-hour requirements on all employers in the United States of a certain size³⁸—does not

31. See *New York*, 505 U.S. at 175–77.

32. *Id.* at 175.

33. *Printz*, 521 U.S. at 935.

34. *Id.*

35. See SULLIVAN & GUNTHER, *supra* note 26, at 142 (explaining that neither *New York* nor *Printz* “questioned Congress’s ability to regulate the states’ own conduct under general laws that also regulate the similar conduct of private actors”).

36. See *id.*

37. 29 U.S.C. §§ 201–219 (2006 & Supp. 2011).

38. See *id.* §§ 203(d), 203(e)(2), 206–207.

“commandeer” the states because it does not force them to implement, administer, or enforce federal law.³⁹ Rather, such legislation merely requires state governments to conform their behavior to a particular federal norm, a norm imposed on every entity in the country engaged in that same activity. Statutes like the FLSA treat the states as *objects* of federal regulation, not as tools for the implementation of a federal legislative program.⁴⁰

The Supreme Court in 1985 upheld Congress’s application of such generally applicable laws (like the FLSA) to state governments and their political subdivisions in *Garcia v. San Antonio Metropolitan Transit Agency*.⁴¹ And when the Court later decided *New York and Printz*, the Justices were careful to distinguish *Garcia*, thus preserving its holding.⁴² Moreover, in 2000, the Court reaffirmed Congress’s authority to regulate the conduct of the states through generally applicable legislation in *Reno v. Condon*,⁴³ thus attesting to *Garcia*’s continuing vitality.⁴⁴ As the Court explained in *Condon*, the challenged federal statute (the Driver’s Privacy Protection Act) was constitutional because it “regulates the States as the owners of data bases,” not “in their sovereign capacity to regulate their own citizens.”⁴⁵

C. *Prohibitions and Commands to Act*

A second important limit on the anti-commandeering principle is that it only forbids federal laws that command state governments to take *affirmative steps* in regulating or governing their residents.⁴⁶ It does not extend to mere prohibitions—commands that states *not* regulate in a particular fashion.⁴⁷ This must be so, for otherwise the

39. See *Reno v. Condon*, 528 U.S. 141, 151 (2000) (concluding that, because the challenged federal law did “not require the States in their sovereign capacity to regulate their own citizens,” but instead “regulate[d] the States as the owners of data bases,” it was “consistent with the constitutional principles enunciated in *New York* and *Printz*”); cf. *Printz*, 521 U.S. at 932; *New York v. United States*, 505 U.S. 144, 161 (1992).

40. See SULLIVAN & GUNTHER, *supra* note 26, at 142.

41. See 469 U.S. 528, 555–56 (1985).

42. See *Printz*, 521 U.S. at 932; *New York*, 505 U.S. at 160–61; Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism: New York, Printz, and Yetsky*, 1998 SUP. CT. REV. 71, 110 (1998).

43. 528 U.S. 141 (2000).

44. See *id.* at 151.

45. *Id.*

46. See Adler & Kreimer, *supra* note 42, at 89–95.

47. See *id.*; see also Brief for the Petitioners at 29, *Reno v. Condon*, 528 U.S. 141 (2000) (No. 98-1464) (“The distinction between laws that impose affirmative obligations on States and those that prevent States from taking action is well reflected in this Court’s preemption jurisprudence.”).

anti-commandeering principle would swallow up the doctrine of preemption, a doctrine essentially dictated by the text of the Constitution itself.

The Supremacy Clause of Article VI provides that

[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.⁴⁸

Since the earliest days of the Republic, this language has been understood as dictating that, when federal law and a state law conflict, the state law—whether in the form of a state constitutional provision, statute, administrative regulation, or common law rule of liability—is inoperable.⁴⁹ A federal statute that preempts state law—most obviously, when it does so through an express preemption clause—is, in essence, a command by Congress that the states *not* regulate or govern in a particular way. Thus, if the anti-commandeering principle and the doctrine of preemption are to coexist, the former can only apply to directives requiring the states affirmatively to act. Federal commands that states not regulate cannot be a commandeering.⁵⁰

This distinction between prohibitions and mandates to take affirmative acts may be somewhat artificial, especially at the edges.⁵¹ As the lengthy debate as to whether the ACA's minimum coverage provision regulates "activity" or "inactivity" illustrated, prohibitions

48. U.S. CONST. art. VI.

49. See, e.g., *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819); see also *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) ("[S]ince our decision in [*M'Culloch*], it has been settled that state law that conflicts with federal law is 'without effect.' " (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981))).

50. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2622 (2012) (Ginsburg, J., concurring in part and dissenting in part); Siegel, *supra* note 26, at 1646 (distinguishing preemption from commandeering, while noting that the former might actually interfere more with a state's sovereign interests); Rachel F. Preiser, Note, *Staking Out the Border Between Commandeering and Conditional Preemption: Is the Driver's Privacy Protection Act Constitutional Under the Tenth Amendment?*, 98 MICH. L. REV. 514, 537 (1999) ("The *New York* and *Printz* Courts recognized the constitutionality of federal preemption of state law, thereby affirming the distinction between preemption and impermissible federal commandeering of the states.").

51. See *Archie v. Racine*, 847 F.2d 1211, 1213 (7th Cir. 1988) (en banc) ("[I]t is possible to restate most actions as corresponding inactions with the same effect . . .").

can often be re-characterized as commands to act, and vice-versa.⁵² Still, the action-inaction distinction is generally respected in law,⁵³ and it accurately captures the Court's various pronouncements of the anti-commandeering principle in its opinions—pronouncements that presumably were crafted with the implications for preemption doctrine in mind. For instance, the Court stated in *Condon* that the Driver's Privacy Protection Act—which regulates how states can disseminate drivers' personal information collected by the states through their departments of motor vehicles—does not commandeer the states because "[i]t does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals."⁵⁴ Similarly, the Court in both *New York* and *Printz* phrased the anti-commandeering principle as prohibiting the federal government from "compel[ling] the States to enact or administer a federal regulatory program."⁵⁵ As such, this action-prohibition distinction sets an important boundary between unconstitutional commandeering and permissible regulations.

D. *Commands, Enticements, and Coercion*

A final limitation on the anti-commandeering principle—and the one most immediately relevant in the *Health Care Cases*—is that, though Congress cannot command the states to take affirmative steps to govern in a particular fashion, nothing precludes Congress from

52. For instance, consider section 201(a) of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 243, 243 (codified at 42 U.S.C. § 2000a(a) (2006)). It provides that "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a(a) (2006). The Act further provides that all hotels are "places of public accommodation." *Id.* § 2000a(b)(1). Does this provision merely prohibit hotels from engaging in discrimination on the basis of race, color, religion, or national origin? Or does it compel hoteliers into action, forcing them to let rooms to persons whom they otherwise might not serve?

53. Indeed, it was critical to the Court's conclusion in the *Health Care Cases* that the minimum coverage provision, because it regulated "inactivity," exceeded Congress's authority to regulate interstate commerce. See *Nat'l Fed'n. of Indep. Bus.*, 132 S. Ct. at 2589 (opinion of Roberts, C.J.) ("To an economist, perhaps, there is no difference between activity and inactivity But the distinction between doing something and doing nothing would not have been lost on the Framers, who were 'practical statesmen,' not metaphysical philosophers." (quoting *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 673 (1980) (Rehnquist, J., concurring))).

54. *Reno v. Condon*, 528 U.S. 141, 151 (2000).

55. *New York v. United States*, 505 U.S. 144, 188 (1992); *Printz v. United States*, 521 U.S. 898, 933 (1997) (quoting the same language from *New York*).

encouraging the states to do the same through the enticement of federal largesse. The first clause of Article I, Section 8 grants Congress the authority to “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States”⁵⁶ Congress can use this spending power to offer funding to state governments on the condition that they accept certain strings that come attached.⁵⁷ To be sure, the spending program must promote the “general welfare”; the spending conditions must be germane to the purposes of the spending program; the conditions must be unambiguous (so the states can fully appreciate the obligations they are accepting); and the conditions cannot induce the states to act unconstitutionally.⁵⁸ But assuming these requirements are satisfied, nothing prevents Congress from achieving indirectly (through conditional spending) what would constitute an impermissible commandeering if directly compelled. As the Court explained in *New York*, when Congress employs such a “permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply.”⁵⁹

Critical to the constitutionality of such conditional spending, of course, is that the states’ acceptance of the strings attached to the federal dollars is voluntary. If the conditions were actually commands, they would amount to a commandeering (assuming those conditions required the states to take affirmative steps in their sovereign capacities). A natural question, then, is whether the terms imposed on the states’ receipt of federal funds—funds to which the states have no constitutional entitlement—can ever be so coercive as to constitute compulsion.

Two Supreme Court decisions predating the *Health Care Cases* suggested that they could. In the 1987 case of *South Dakota v. Dole*,⁶⁰ the Court noted, “Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into

56. U.S. CONST. art. I, § 8, cl. 1.

57. See, e.g., *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999) (“Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions.”).

58. See *South Dakota v. Dole*, 483 U.S. 203, 207–11 (1987).

59. *New York*, 505 U.S. at 168.

60. 483 U.S. 203 (1987).

compulsion.’ ”⁶¹ This sentence in *Dole* quoted the Court’s 1937 decision in *Steward Machine Co. v. Davis*,⁶² a case in which the Court proffered a similar suggestion. Specifically, in upholding the federal spending program at issue, the *Steward Machine* Court concluded that “[n]othing in the case suggest[ed] the exertion of a power akin to undue influence.”⁶³

Read in their entirety, though, *Dole* and *Steward Machine* are enigmatic. Only five sentences after seeming to concede (in the language quoted above) that spending conditions can be coercive, the *Dole* Court threw some cold water on the idea:

[T]o hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems.⁶⁴

This, too, was a direct quote from *Steward Machine*. And a closer examination of *Steward Machine* reveals that the Court was really just assuming *arguendo* the existence of a coercion doctrine. Here is the relevant passage from *Steward Machine* in its entirety:

Nothing in the case suggests the exertion of a power akin to undue influence, *if we assume that such a concept can ever be applied with fitness to the relations between state and nation*. Even on that assumption the location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree,—at times, perhaps, of fact.⁶⁵

Thus, while *Dole* and *Steward Machine* were often cited for the proposition that “Congress may not employ the spending power in such a way as to ‘coerce’ the states into compliance with the federal objective,”⁶⁶ it was unclear, as of June 27, 2012, whether this was

61. *Id.* at 211 (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

62. 301 U.S. 548 (1937).

63. *Id.* at 590.

64. *Dole*, 483 U.S. at 211 (quoting *Steward Mach.*, 301 U.S. at 589–90).

65. *Steward Mach.*, 301 U.S. at 590 (emphasis added).

66. *Florida v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235, 1264 (11th Cir. 2011), *rev’d*, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012); *see also* *Van Wyhe v. Reisch*, 581 F.3d 639, 651–52 (8th Cir. 2009) (“[A]lthough the federal funding amount involved here is not insubstantial, it does not render the statute unconstitutionally coercive”); *Sch. Dist. of Pontiac v. Sec’y of U.S. Dep’t of Educ.*, 512 F.3d 252, 277 n.2 (6th Cir. 2008) (noting that, when Congress uses its spending power to encourage the states to take certain actions, “the financial incentives must not amount to coercion”);

actually a governing rule of constitutional law. The Supreme Court had *never* invalidated a federal spending condition imposed on the states as coercive.⁶⁷ Nor had any other court, at any level, in the history of the United States.⁶⁸ The *Health Care Cases* changed things.

II. THE *HEALTH CARE CASES*

The Court's decision in the *Health Care Cases* was a big, *big* deal. In sustaining the central provisions of the ACA, the Court placed its imprimatur on a hugely important federal statute—one with the potential to fundamentally alter the terms of the modern welfare state.⁶⁹ As important, the Chief Justice's opinion was arguably a master stroke of judicial statesmanship, crossing ideological lines to steer the Court clear of some treacherous political waters.⁷⁰ To date, most commentary has generally focused on the Court's upholding of the individual mandate, the linchpin of the ACA's broader regulation of the individual insurance market and the provision that, given its centrality to the Act's regulatory scheme, threatened to bring down

Madison v. Virginia, 474 F.3d 118, 128 (4th Cir. 2006) (“[H]ard choices do not alone amount to coercion.”); Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 278–79 (5th Cir. 2005) (“[T]he *Dole* court recognized a fifth requirement [of conditions on federal funds] that the condition not be coercive”); Nieves-Márquez v. Puerto Rico, 353 F.3d 108, 128 (1st Cir. 2003) (“Under *South Dakota v. Dole*, . . . the financial pressure created by the conditional grant of federal funds must not rise to the level of compulsion.”).

67. See *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2634 (Ginsburg, J., concurring in part and dissenting in part) (“Prior to today's decision . . . the Court has never ruled that the terms of any grant crossed the indistinct line between temptation and coercion.”).

68. See *Florida v. U.S. Dep't of Health & Human Servs.*, 648 F.3d at 1266 (“[O]ur review of the relevant case law indicates that no court has ever struck down a law such as this one as unduly coercive.”).

69. See Balkin, *supra* note 2; Fishkin, *supra* note 4.

70. See Friedman, *supra* note 5, at 87; Jeffrey Rosen, *Big Chief: How to Understand John Roberts*, NEW REPUBLIC, Aug. 2, 2012, at 13–14, available at <http://www.tnr.com/article/politics/magazine/104898/john-roberts-supreme-court-aca#>; David L. Franklin, *Why Did Roberts Do It? To Save the Court.*, SLATE (June 28, 2012, 3:51 PM ET), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/06/john_roberts_broke_with_conservatives_to_preserve_the_supreme_court_s_legitimacy.html; Bradley Joondeph, *A Marbury for Our Time*, SCOTUSBLOG (June 29, 2012, 2:36 PM), <http://www.scotusblog.com/2012/06/a-marbury-for-our-time/>; Adam Winkler, *The Roberts Court Is Born*, SCOTUSBLOG (June 28, 2012, 12:01 PM), <http://www.scotusblog.com/2012/06/the-roberts-court-is-born/>. But see David Bernstein, *Rosen on Roberts as Statesman*, THE VOLOKH CONSPIRACY (July 15, 2012, 10:12 PM), <http://www.volokh.com/2012/07/15/rosen-on-roberts-as-statesman/> (contending that “one thing seems pretty certain: the way Roberts handled the case has not actually served the goal of enhancing the Court's reputation of being ‘above politics’ ”); Ilya Somin, *The Impact of the Individual Mandate Decision on the Supreme Court's Legitimacy*, THE VOLOKH CONSPIRACY (July 13, 2012, 12:57 PM), <http://www.volokh.com/2012/07/13/the-impact-of-the-individual-mandate-decision-on-the-supreme-courts-legitimacy/> (arguing that the decision may have detracted from the Court's legitimacy more than it enhanced it).

the entire ACA (if the Supreme Court found it both unconstitutional and inseverable).⁷¹ But the other important question the Court decided—whether the ACA impermissibly coerced the states into participating in the Act’s massive expansion of the Medicaid program—may actually prove more significant as a matter of constitutional law.⁷²

A. *The ACA’s Expansion of Medicaid*

Again, Medicaid is the joint federal-state spending program that offers health insurance to the indigent and the disabled. States are not required to participate in the program.⁷³ But if they do, they must abide by a variety of standards to qualify for the associated federal funding (known as the “federal medical assistance percentage,” or “FMAP”).⁷⁴ The size of the FMAP varies by state, generally ranging from fifty to eighty-three percent of the program’s costs.⁷⁵ Congress originally enacted Medicaid in 1965 as Title XIX of the Social Security Act,⁷⁶ and it is now the single largest federal aid program to the states, accounting for forty-five percent of all federal grant-in-aid to state governments.⁷⁷ It is the third largest domestic spending

71. See sources cited *supra* note 6.

72. See, e.g., Pamela S. Karlan, *No Respite for Liberals*, N.Y. TIMES, July 1, 2012, at SR7 (“That the individual mandate was upheld should not overshadow the court’s ruling on Medicaid expansion—the part of the ruling that is most likely to affect other legislation in the near future.”); Erin Ryan, *Spending Power Bargaining After Sebelius 1* (SSRN Working Paper No. 2119241, 2012), available at <http://ssrn.com/abstract=2119241> (“[T]he most immediately significant portion of the ruling—and one with far more significance for most regulatory governance—is the part of the decision limiting the federal spending power that authorizes Medicaid.”); Charles Fried, *The June Surprises: Balls, Strikes, and the Fog of War*, SCOTUSBLOG (Aug. 2, 2012, 12:19 PM), <http://www.scotusblog.com/2012/08/the-june-surprises-balls-strikes-and-the-fog-of-war/> (“But the Commerce Clause activity/inactivity argument is so artificial and strained that at the end of the day it may not be very constraining, easily gotten around by skillful drafting. The Medicaid expansion invalidation, however, has potential for cutting a broad swath through many programs hitherto seen as unassailable under the rubric of cooperative federalism.”); Gillian Metzger, *Something for Everyone*, SCOTUSBLOG (June 28, 2012, 5:08 PM), <http://www.scotusblog.com/2012/06/something-for-everyone/> (“The Spending Clause ruling portends greater import.”).

73. See *Frew v. Hawkins*, 540 U.S. 431, 433 (2004); *Harris v. McRae*, 448 U.S. 297, 301 (1980).

74. See 42 U.S.C. § 1396c (2006); *Frew*, 540 U.S. at 433; *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 502 (1990); *Harris*, 448 U.S. at 301.

75. See 42 U.S.C. § 1396d(b) (2006).

76. Social Security Amendments of 1965, § 121, Pub. L. No. 89-97, 79 Stat. 286, 343–52 (codified as amended at 42 U.S.C. §§ 1396 to 1396w-5 (2006 & Supp. 2010)).

77. KAISER COMM’N ON MEDICAID & THE UNINSURED, MEDICAID MATTERS: UNDERSTANDING MEDICAID’S ROLE IN OUR HEALTH CARE SYSTEM 2 (2011), <http://www.kff.org/medicaid/upload/8165.pdf>.

program (behind only Social Security and Medicare), providing health coverage to nearly sixty million Americans and accounting for eight percent of the federal budget.⁷⁸ Medicaid's present role in the states' finances is staggering: In fiscal year 2008, state governments collectively spent 16.3% of their general fund dollars on Medicaid, and the program accounted for 20.7% of state spending in total.⁷⁹

Wholly aside from the ACA, federal law imposes numerous requirements on states that participate in Medicaid (all of which do).⁸⁰ If a state fails to comply with these requirements,

the Secretary [of Health and Human Services] shall notify such State agency that further payments will not be made to the State (or, in his discretion, that payments will be limited to categories under or parts of the State plan not affected by such failure), until the Secretary is satisfied that there will no longer be any such failure to comply.⁸¹

At the same time, federal law has always afforded states a fair degree of flexibility in structuring their own distinct Medicaid programs.⁸² Historically, the states have retained discretion over matters such as coverage eligibility levels, provider reimbursement rates, and (with some limitations) the range of services covered.⁸³

The ACA reduced this state-level discretion. Most importantly, the Act imposed three new, related requirements: (1) states must extend their coverage to non-disabled childless adults under the age of sixty-five;⁸⁴ (2) they must, at a minimum, set their coverage eligibility level at 133% of the federal poverty level (which, in practice, translates to 138% of the federal poverty level);⁸⁵ and (3)

78. *Id.* at 1–2.

79. KAISER COMM'N ON MEDICAID & THE UNINSURED, HOPING FOR ECONOMIC RECOVERY, PREPARING FOR HEALTH REFORM: A LOOK AT MEDICAID SPENDING, COVERAGE AND POLICY TRENDS 11 fig.3 (2010), <http://www.kff.org/medicaid/upload/8105.pdf>.

80. *See generally* 42 U.S.C. § 1396a(a) (2006) (specifying a multitude of provisions that a state plan for medical assistance must include).

81. 42 U.S.C. § 1396c (2006).

82. *See* Brief for Respondents (Medicaid) at 3–8, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (No. 11-400).

83. *See Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2601 (opinion of Roberts, C.J.).

84. *Id.* (citing 42 U.S.C. § 1396(a)(10)(A)(i)(VIII) (2006)).

85. Section 2001(a)(1) of the ACA mandates that, beginning in 2014, states must provide coverage to all individuals under the age of sixty-five (including childless adults) with incomes under 133% of the federal poverty level. *Id.* Given the definition of modified adjusted gross income dictated by section 1004 of the Health Care and Education Reconciliation Act, this effectively means 138% of the federal poverty level. *See* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 1004(e), 124 Stat 1029, 1036; *see also* KAISER COMM'N ON MEDICAID & THE UNINSURED, EXPLAINING

they must guarantee all covered individuals a so-called “benchmark” benefits package.⁸⁶ Together, these provisions constitute a substantial expansion of the program: participating states must provide minimum, benchmark coverage to all their non-elderly residents with incomes up to 138% of the federal poverty level.

Until now, Medicaid has never included non-disabled childless adults. And presently the median state eligibility level is only 63% of the federal poverty level.⁸⁷ (Indeed, seventeen states have eligibility cutoffs that are below *half* the federal poverty rate.⁸⁸) The ACA (if all states participate) will thus increase enrollment in Medicaid by somewhere between sixteen and twenty-three million individuals by 2019.⁸⁹ The federal government will reimburse states for the bulk of the costs attributable to this expansion, but it will not cover all of them.⁹⁰ As provided in section 1201 of the Health Care and Education Reconciliation Act—the law enacted three days after the ACA to amend some of its provisions—the United States will pay for 100% of these expenses from 2014 to 2016, 95% in 2017, 94% in 2018, 93% in 2019, and 90% thereafter.⁹¹

B. *The Supreme Court’s Medicaid Holding*

In their challenge to the ACA, the twenty-six state plaintiffs claimed that their existing, pre-ACA Medicaid funding streams were simply too massive for the states to have any real option of withdrawing from the program.⁹² The Act, they argued, “threatens States with the loss of every penny of federal funding under the single

HEALTH REFORM: THE NEW RULES FOR DETERMINING INCOME UNDER MEDICAID IN 2014, at 2 n.2 (2011), www.kff.org/healthreform/upload/8194.pdf (“In determining eligibility, states will be required to reduce countable income by an amount equal to 5 percent of the poverty line, so the Medicaid income eligibility threshold effectively becomes 138 percent of the federal poverty line.”).

86. 42 U.S.C. §§ 1396a(k)(1), 1396u-7(b)(5), 18022(b) (2006 & Supp. 2010).

87. See KAISER COMM’N ON MEDICAID & THE UNINSURED, PERFORMING UNDER PRESSURE: ANNUAL FINDINGS OF A 50-STATE SURVEY OF ELIGIBILITY, ENROLLMENT, RENEWAL, AND COST-SHARING POLICIES IN MEDICAID AND CHIP, 2011–2012, at 11 fig.11 (2012), <http://www.kff.org/medicaid/upload/8272.pdf>.

88. *Id.* at 11 fig.12.

89. KAISER COMM’N ON MEDICAID & THE UNINSURED, MEDICAID COVERAGE AND SPENDING IN HEALTH REFORM: NATIONAL AND STATE-BY-STATE RESULTS FOR ADULTS AT OR BELOW 133% FPL 2–5 (2010), <http://www.kff.org/healthreform/upload/medicaid-coverage-and-spending-in-health-reform-national-and-state-by-state-results-for-adults-at-or-below-133-fpl.pdf>.

90. See Health Care and Education Reconciliation Act § 1201, 42 U.S.C. § 1396d(y) (2006).

91. See *id.*

92. See Brief of State Petitioners on Medicaid, *supra* note 10, at 23.

largest grant-in-aid program in existence—literally *billions* of dollars each year—if they do not capitulate to Congress’ steep new demands.”⁹³ To them, there was “no plausible argument that a State could afford to turn down such a massive federal inducement, particularly when doing so would mean assuming the full burden of covering its neediest residents’ medical costs.”⁹⁴

By a margin of seven to two, the Supreme Court agreed, though no single opinion garnered five votes. Justices Scalia, Kennedy, Thomas, and Alito would have invalidated the ACA’s Medicaid expansion *in toto*.⁹⁵ Chief Justice Roberts’s opinion, joined on this point by Justices Breyer and Kagan, was less sweeping. It concluded that the ACA’s Medicaid expansion conditions were indeed coercive, but only insofar as they operated as strings attached to the states’ *existing* Medicaid funding.⁹⁶ Because the Chief Justice’s opinion articulates the narrowest rationale for sustaining the Court’s Medicaid judgment, it is likely controlling on this point.⁹⁷

The Chief Justice began his analysis by explaining that Congress could certainly “condition the receipt of funds on the States’ complying with restrictions on the use of those funds, because that is the means by which Congress ensures that the funds are spent according to its view of the ‘general Welfare.’”⁹⁸ Under the ACA, though, the states’ failure to comply with the new conditions did not

93. *Id.*

94. *Id.*

95. *See Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2643 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

96. *See id.* at 2607 (opinion of Roberts, C.J.) (“What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.”).

97. A technical application of the Court’s own rules for discerning what is “precedential” in a situation like this forbids combining the three votes of Roberts, Breyer, and Kagan with the four votes of the dissenters, as these seven did not concur in the same ultimate judgment. *Cf. Marks v. United States*, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .’” (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). But the spirit of *Marks* certainly dictates that the Chief Justice’s opinion, as the narrowest ground for reaching the Court’s ultimate result, should be viewed as controlling. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2601–08 (opinion of Roberts, C.J.). Moreover, it is worth noting that, no matter the differences between those joining the Chief Justice’s opinion and the joint dissenters on the Medicaid question, all seven of these justices agreed on the point that I am exploring here: that a federal instruction to a state can constitute a “command” when it leaves the state no practical choice “in fact.” *Id.*; *id.* at 2656–68 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

98. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2603–04 (opinion of Roberts, C.J.).

just jeopardize the funds that the federal government was offering for Medicaid expansion. Rather, the conditions took “the form of threats to terminate other significant independent grants”—the states’ preexisting Medicaid dollars.⁹⁹ Consequently, “the conditions are properly viewed as a means of pressuring the States to accept policy changes.”¹⁰⁰

Such pressuring, achieved through the tool of conditional spending, is generally no more than “encouragement,” and thus perfectly constitutional.¹⁰¹ But in the ACA, explained Roberts, this pressure crossed the line into compulsion.¹⁰² The “financial ‘inducement’ Congress has chosen is much more than ‘relatively mild encouragement,’ ” but instead “a gun to the head.”¹⁰³ Again, 42 U.S.C. § 1396c gives the Secretary the authority to terminate the entirety of a state’s federal Medicaid reimbursement if the state fails to comply with any of the Act’s requirements. Thus, a state choosing not to expand its Medicaid coverage as prescribed by the ACA stood “to lose not merely ‘a relatively small percentage’ of its existing Medicaid funding, but *all* of it.”¹⁰⁴ And the states’ practical dependence on the existing Medicaid program is undeniable. Not only is the states’ financial reliance on existing federal Medicaid reimbursements enormous,¹⁰⁵ but the states “have developed intricate statutory and administrative regimes over the course of many decades to implement their objectives under existing Medicaid.”¹⁰⁶ This dependence, reasoned the Chief Justice, meant that Congress was effectively leaving the states with no choice: “The threatened loss of over 10 percent of a State’s overall budget, in contrast [to the funds at issue in *Dole*], is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.”¹⁰⁷

Importantly, reasoned Roberts, the Act’s Medicaid expansion did not simply constitute “a modification of the existing Medicaid program.”¹⁰⁸ Instead, it represented “a new program,” a “shift in kind,

99. *Id.* at 2604.

100. *Id.*

101. *Id.* (noting that the Court in *Dole* had “found that the inducement was not impermissibly coercive, because Congress was offering only ‘relatively mild encouragement to the States’ ”).

102. *See id.*

103. *Id.*

104. *Id.*

105. *See id.* (“Medicaid spending accounts for over 20 percent of the average State’s total budget, with federal funds covering 50 to 83 percent of those costs.”).

106. *Id.*

107. *Id.* at 2605.

108. *Id.*

not merely degree.”¹⁰⁹ Under the ACA, “Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the [federal] poverty level.”¹¹⁰ Rather than continuing as a “program to care for the neediest among us,” the ACA makes Medicaid “an element of a comprehensive national plan to provide universal health insurance coverage.”¹¹¹ Indeed, Congress recognized this qualitative shift in its structuring of the program’s expansion; there is a separate funding provision for those persons “newly eligible” for Medicaid, and the federal reimbursement rate for these recipients differs from that for those previously eligible.¹¹² Moreover, the states could hardly have anticipated such a significant change in Medicaid when they originally agreed to participate in the program.¹¹³ Though Congress expressly reserved the “right to alter, amend, or repeal” any aspect of Medicaid,¹¹⁴ no state could have expected this reservation to include “the power to transform [the program] so dramatically.”¹¹⁵

Thus, Congress was not merely amending the terms under which states could spend dollars provided by the federal government. Congress was effectively forcing the states to implement the ACA’s distinct Medicaid-expansion program by “threatening the funds for the existing Medicaid program.”¹¹⁶ Given the states’ reliance on that existing program, this threat was coercive.¹¹⁷ Congress was effectively commanding the states to govern according to Congress’s instructions.¹¹⁸

This conclusion did not render the ACA’s expansion of Medicaid unconstitutional in its entirety, however. It only meant that Congress could not “penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.”¹¹⁹ Hence, forbidding the Secretary from applying § 1396c “to withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion” fully remedied the constitutional violation.¹²⁰ The

109. *Id.*

110. *Id.* at 2606.

111. *Id.*

112. *Id.*

113. *See id.*

114. 42 U.S.C. § 1304 (2006).

115. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2606 (opinion of Roberts, C.J.).

116. *Id.* at 2605.

117. *See id.* at 2608 (“As for the Medicaid expansion, that portion of the Affordable Care Act violates the Constitution by threatening existing Medicaid funding.”).

118. *See id.*

119. *Id.* at 2607.

120. *Id.*

Court therefore validated Congress's authority to attach conditions to the ACA's *new* funding: "Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use."¹²¹

After the *Health Care Cases*, then, the states have a choice—or, really, two choices. They can choose whether to continue participating in the pre-ACA Medicaid program, according to the conditions previously laid down by Congress; or they can choose whether to participate in the Act's expansion of Medicaid, according to the terms set out in the ACA.¹²²

III. THE NEW MEANING OF COMMANDS (AND COMMANDEERING)

The Court's decision in the *Health Care Cases* was the first in United States history to invalidate a federal spending provision on the ground that it coerced the states, and it immediately sent constitutional lawyers scurrying to identify other programs that may now be constitutionally suspect.¹²³ As others have explained, the decision could mark a sea change in the scope of Congress's spending power; significant aspects of major federal statutes, such as the Clean Air Act or the No Child Left Behind Act, may now be unconstitutional.¹²⁴ But the decision's implications do not stop there. Properly understood, the new limits that the *Health Care Cases* impose on Congress's spending authority are merely one application—albeit an important one—of the ruling's underlying rationale. What lies deeper in the opinion is a new approach to what constitutes a federal "command" to the states. In fine, the *Health Care Cases* re-conceptualized what qualifies as federal *compulsion*,

121. *Id.*

122. See Robert Pear, *Uncertainty over States and Medicaid Expansion*, N.Y. TIMES, June 29, 2012, at A16; *Where Each State Stands on ACA's Medicaid Expansion*, ADVISORY BD. CO. (July 17, 2012, 3:00 PM), <http://www.advisory.com/Daily-Briefing/2012/07/05/Where-each-state-stands-of-the-Medicaid-expansion> (finding that Texas, Louisiana, Mississippi, Florida, and South Carolina "will not participate" in the Medicaid expansion).

123. See Adler & Stewart, *supra* note 19, at 14–15; Bagenstos, *supra* note 19, at 47; Nicole Huberfield, *Starting to Work Beneath the Surface of the Medicaid Holding*, CONCURRING OPINIONS (June 29, 2012), <http://www.concurringopinions.com/archives/2012/06/starting-to-work-beneath-the-surface-of-the-medicaid-holding.html>

("Undoubtedly we will see future coercion cases, and not just in healthcare. While Medicaid is one of the oldest conditional spending programs, it is one of many. Other conditional spending programs include educational funding, transportation funding, environmental protection laws, and welfare laws, just to name a few.")

124. See Bagenstos, *supra* note 19, at 48, 58.

and in the process extended the reach of the anti-commandeering doctrine.

To see this, it is important to deconstruct exactly why the Court found the ACA's Medicaid provisions unconstitutional. The ultimate constitutional problem was not simply that the Act exceeded Congress's spending power; a federal statute can exceed Congress's spending authority but nonetheless be constitutional if it fits within one of Congress's other enumerated powers.¹²⁵ Rather, the ultimate constitutional problem was that the ACA commandeered the states—in the words of the Chief Justice, it “‘require[d] the States to govern according to Congress’ instructions.’”¹²⁶ But the ACA did not formally require the states to do anything with respect to Medicaid. As a strictly legal matter, the states were free to walk away from the program if they so desired.¹²⁷ The Court nonetheless treated the conditions that the ACA attached to the states' existing Medicaid funds as obligations because, given the practical realities facing the states, they had no “genuine” or “real choice” but to accept Congress's conditions.¹²⁸ The ACA only offered the states a choice “in theory,” not “in fact.”

The critical move in the Court's analysis, then, was how it framed the inquiry as to whether a federal law “commands” the states. At bottom, the *Health Care Cases* rest on the premise that this inquiry turns on more than legal form. Instead, the question is a practical one: All things considered, do the states have a genuine choice and a real option of rejecting the federal government's conditions? If the states lack the practical ability to say no—if their choice is not genuinely voluntary—the federal law's conditions must be viewed as commands. And if those commands require the states to take affirmative acts in their sovereign capacities, then the federal law violates the anti-commandeering principle.

Again, the greatest practical significance of this new conceptualization of commands lies in its application to federal-state conditional spending programs, the precise context in which the

125. See *Pierce Cnty. v. Guillen*, 537 U.S. 129, 146–47 & n.9 (2003) (declining to resolve whether a provision of the Highway Safety Act of 1966 was within Congress's spending power, but nonetheless holding that it constituted a valid regulation under the Commerce Clause).

126. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2602 (opinion of Roberts, C.J.) (quoting *New York v. United States*, 505 U.S. 144, 162 (1992)).

127. See, e.g., Brief for Respondents (Medicaid), *supra* note 82, at 17 (“Petitioners do not dispute that they are free, as a matter of law, to turn down federal Medicaid funds if they view program conditions as sufficiently contrary to their interests.”).

128. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2604–05 (opinion of Roberts, C.J.).

Health Care Cases arose. Because of the severe financial consequences the states would suffer in withdrawing from various federal grant-in-aid programs, several such programs may now be vulnerable to constitutional challenges. But the deeper rationale of the Court's holding extends further. It potentially applies to any federal law in which two conditions hold: (1) the law presents the states with a choice, and (2) one of the alternatives in that choice is for the states to govern according to Congress's instructions. As such, this new conception of "commands" applies as much to statutes where the other choice—the alternative to governing as directed by federal law—is for the states *not to regulate* (and have their laws preempted) as it does to statutes where the other choice is to walk away from federal largesse. The central question, in either context, is whether the state's choice is genuinely voluntary. Just as the states might lack a real option of withdrawing from a given federal spending program, they might likewise lack the practical capacity to step aside and not govern in a particular field. If so, federal laws previously understood to be perfectly constitutional (as instances of federal preemption) could now amount to impermissible commandeering.

As an illustration, suppose Congress enacts a statute that forbids the states from governing on the subject of X unless they do so according to federal instructions A, B, and C. Prior to the *Health Care Cases*, the statute would have been understood as simply prohibitory, and hence constitutional. The statute does not formally command the states to do anything, but merely preempts certain state laws (those governing on the subject of X) that do not conform to a set of federal norms (articulated in instructions A, B, and C). As explained in *New York*, the Supreme Court has long "recognized Congress' power to offer States the choice of regulating [an] activity according to federal standards or having state law pre-empted by federal regulation."¹²⁹ If a state's inhabitants "would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program."¹³⁰ In other words, the states can simply choose to step aside and do nothing at all.

The *Health Care Cases* disrupt this understanding. If the states have no "genuine choice" but to govern on the subject of X—for whatever set of practical reasons—then they lack any "real option" of

129. *New York*, 505 U.S. at 167.

130. *Id.* at 168.

stepping aside and doing nothing. Instead, the federal statute is effectively *requiring* the states to act, and to act according to federal instructions A, B, and C. The federal law “dragoons” the states into governing according to Congress’s directives.¹³¹

To be sure, the vast majority of federal statutes conditionally preempting state law are almost certainly still constitutional, even after the *Health Care Cases*, because they leave the states a legitimate choice not to govern on Congress’s terms. To pick just one example (from hundreds), consider the Federal Boat Safety Act of 1971, which directs states to “not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment . . . that is not identical to a regulation prescribed” by the Coast Guard.¹³² Whatever “genuine choice” might mean, exactly, state governments surely have the practical capacity not to regulate on the subjects of power boat safety already covered by a Coast Guard regulation. No state could plausibly claim that the Federal Boat Safety Act effectively compels it to enact regulations identical to those prescribed by the federal government.

But many cases will not be so easy. Consider the following hypothetical. Suppose that Congress generally would like to proscribe the unsanitary disposal of liquid toxic waste—i.e., any disposal or discharge of such waste posing a threat to human health or the environment. But Congress has also concluded that, due to mounting budget pressures, the cost of monitoring, investigating, and prosecuting such conduct is simply too expensive for the federal government to bear. Thus, Congress replaces existing federal laws on the subject with a statute that offers the states the following choice: (1) they can enact and enforce state-level legislation, which regulates the disposal of liquid toxic waste in a manner dictated by Congress, or (2) they can step aside and do nothing, in which case federal law will completely preempt the field. Because of federal budget constraints, though, the federal preemption of a given state’s law will mean that the disposal of liquid toxic waste will largely go unregulated in that state. This non-regulation option is hardly what Congress prefers, but Congress also believes that—given each state’s incentives—it is very unlikely to occur.

131. See *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2605 (opinion of Roberts, C.J.) (“The threatened loss of over 10 percent of a State’s overall budget . . . is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.”).

132. 46 U.S.C. § 4306 (2006).

The statute offers the states a choice "in theory." But as a practical matter, state governments would likely find it impossible to endure the unconstrained disposal of liquid toxic waste within their borders, especially if the same conduct is tightly regulated in surrounding states (making their jurisdictions a literal dumping ground). Thus, the choice the federal law offers the states may not be *genuine*; state governments may have no "real option" but to accede to Congress's conditions and implement the prescribed federal regulatory program. If so, the logic of the *Health Care Cases* dictates that this hypothetical federal statute has commanded the states to act affirmatively in regulating according to Congress's instructions, and is thus an unconstitutional commandeering.

We can imagine other examples, but the broader point is this: the *Health Care Cases* have changed the meaning of the anti-commandeering principle. Because the inquiry as to whether a federal law amounts to compulsion is now practical in nature, statutes formally offering the states a choice may nonetheless be treated as issuing the states commands. And if those commands require the states to affirmatively govern in a particular fashion—whether framed as conditions attached to federal funds, or as conditions precedent to avoiding federal preemption—they amount to impermissible commandeering.

IV. A CASE STUDY: THE FEDERAL REGULATION OF STATE TAXATION

Presently, it is unclear how much this new understanding of the anti-commandeering doctrine will actually constrain Congress's legislative authority. Much depends on how the Supreme Court ultimately defines the concept of "genuine choice" (or "real choice"), a matter the *Health Care Cases* left opaque.¹³³ As the Chief Justice wrote, "We have no need to fix a line" that defines "where persuasion gives way to coercion. . . . It is enough for today that wherever that line may be, this statute is surely beyond it."¹³⁴

Whether Congress has left the states a choice "in fact," rather than just "in theory," might turn largely on whether the financial consequences are simply too large for a state realistically to reject

133. See Friedman, *supra* note 5 (stating after the *Health Care Cases*, "the line between inducing state participation, which is legal, and coercing it, which is not, remains hard to identify with precision"); Huberfield, *supra* note 123 ("The Court refused to define coercion beyond assessing the Medicaid expansion as being 'beyond the line' where 'persuasion becomes coercion.'").

134. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2606 (opinion of Roberts, C.J.).

Congress's conditions. (This was certainly one of the chief problems with the ACA's Medicaid provisions.¹³⁵) Or it might depend, at least in part, on whether the states have already invested substantially in the administration and implementation of the affected program—whether they “have developed intricate statutory and administrative regimes over the course of many decades to implement their objectives.”¹³⁶ (This, too, was a problem with the ACA cited in the *Health Care Cases*.¹³⁷) Or it could hinge to some degree on whether the subject at issue is central to a state's status as an independent sovereign, a factor the Court has considered in resolving several other questions of constitutional federalism.¹³⁸

In all events, there is at least one area where the new meaning of commandeering seems likely to apply—where the financial consequences for the states are potentially enormous, where the states have developed intricate statutory and administrative regimes over the course of many decades, and where the subject matter is core to the states' sovereignty. And that is the field of state and local taxation.

A. *State and Local Taxation in the United States*

At this point, a brief primer on state and local taxes is in order. State and local governments impose a wide variety of taxes, all of which have some impact on interstate commerce. As of 2008 (the latest year for which the relevant data are available), the most significant subnational taxes were those imposed on sales and gross receipts (\$449 billion), property (\$410 billion), personal income (\$305

135. *See id.* at 2605 (“The threatened loss of over 10 percent of a State's overall budget . . . is economic draughting that leaves the States with no real option but to acquiesce in the Medicaid expansion.”).

136. *Id.* at 2604.

137. *See id.*

138. *See United States v. Morrison*, 529 U.S. 598, 617–18 (2000) (holding that the civil remedy provision of the Violence Against Women Act exceeded Congress's commerce power in part because “[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States”); *United States v. Lopez*, 514 U.S. 549, 564 (1995) (invalidating the Gun-Free School Zones Act in part because it intruded on “areas such as criminal law enforcement or education where States historically have been sovereign”); *Nat'l League of Cities v. Usery*, 426 U.S. 833, 833 (1976) (holding that Congress lacked the authority to regulate the conduct of state governments “in areas of traditional governmental functions”); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (stating that, when Congress legislates “in a field which the States have traditionally occupied,” the Court “start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress”).

billion), and corporate income (\$58 billion).¹³⁹ All told, state and local governments collected more than \$1.3 trillion in tax revenue in 2008, accounting for more than one third of the tax burden in the United States.¹⁴⁰

Given our federal structure, states have an inherent incentive to minimize the tax burden borne by their own residents while, at the same time, maximizing their collection of revenue. Thus, states are constantly devising tax schemes that, in one way or another, burden or discriminate against interstate commerce.¹⁴¹ Historically, our constitutional system's principal means for policing this parochial behavior has been through the judiciary's enforcement of the dormant Commerce Clause—a negative inference the Supreme Court has long drawn from the Constitution's affirmative grant of authority to Congress to regulate interstate commerce, and which generally forbids the states from discriminating against or unduly burdening interstate commerce.¹⁴² Going back to its 1852 decision in *Cooley v. Board of Wardens*,¹⁴³ the Court has invoked the Commerce Clause to invalidate state or local laws that interfere with the creation of a common national market, free from state or local trade barriers.¹⁴⁴ Significantly, the Court has used the dormant Commerce Clause specifically to invalidate state or local tax measures since at least 1872.¹⁴⁵

The Court's application of the dormant Commerce Clause to state and local taxes has hardly followed a steady path. As the Justices observed a half-century ago, despite having by then “handed down some three hundred full-dress opinions” on the subject, their decisions “have been ‘not always clear[,] ... consistent or

139. U.S. CENSUS BUREAU, U.S. DEPT' OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, at 273 tbl. 435 (2012), available at <http://www.census.gov/compendia/statab/2012/tables/12s0435.pdf>.

140. *Id.*

141. See Shaviro, *supra* note 24, at 911.

142. See, e.g., *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997) (“The negative or dormant implication of the Commerce Clause prohibits state taxation ... that discriminates against or unduly burdens interstate commerce ...”).

143. 53 U.S. (12 How.) 299, 318 (1852).

144. See HELLERSTEIN & HELLERSTEIN, *supra* note 25, at 194; 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-2, at 1030 (3d ed. 2000).

145. See *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232, 232 (1872); see also HELLERSTEIN & HELLERSTEIN, *supra* note 23, ¶ 4.08, at 4-31 (“The *Case of the State Freight Tax* first unequivocally announced and squarely applied the doctrine that the Commerce Clause by its own force limits state tax power over interstate commerce.”).

reconcilable.’ ”¹⁴⁶ Still, the basic thrust has always been to protect interstate commerce from taxes that operate to protect or advantage in-state economic interests.¹⁴⁷ Presently, the Court applies a four-part test first fully articulated in *Complete Auto Transit, Inc. v. Brady*.¹⁴⁸ Under this *Complete Auto* test, a state or local tax imposed on interstate commerce “will not survive Commerce Clause scrutiny if the taxpayer demonstrates that the tax (1) applies to an activity lacking a substantial nexus to the taxing State; (2) is not fairly apportioned; (3) discriminates against interstate commerce; or (4) is not fairly related to the services provided by the State.”¹⁴⁹ The Court has used these criteria to invalidate scores of state or local taxes.¹⁵⁰

Importantly, though, the federal judiciary is not the only national institution involved in protecting interstate commerce from overweening state and local taxation. At least since the 1950s, Congress has also played a role, enacting a number of statutes regulating how state and local governments impose specific levies. For example, Public Law 86-272 provides that “[n]o State, or political subdivision thereof, shall have power to impose . . . a net income tax on the income derived within such State” when the taxpayer limits its activities in that state to “the solicitation of orders . . . for sales of tangible personal property.”¹⁵¹ The Railroad Revitalization and Regulatory Reform Act forbids states from imposing any tax “that

146. *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457–58 (1959) (second alteration in original) (quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344 (1957)).

147. See generally Donald Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986) (arguing that, as a general matter, the Court’s dormant Commerce Clause decisions are best understood as prohibiting state or local governments from engaging in purposeful economic protectionism).

148. 430 U.S. 274 (1977).

149. *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 310–11 (1994) (emphasis added).

150. See, e.g., *Okla. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 183 (1995); *Barclays*, 512 U.S. at 310–11 (1994); *Quill Corp. v. North Dakota*, 504 U.S. 298, 311 (1992); *Trinova Corp. v. Mich. Dep’t of Treasury*, 498 U.S. 358, 372 (1991); *Amerada Hess Corp. v. Dir., Div. of Taxation, N.J. Dep’t of Treasury*, 490 U.S. 66, 72–73 (1989); *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 30 (1988); *Am. Trucking Ass’n, Inc. v. Scheiner*, 483 U.S. 266, 291 (1987); *Wardair Can., Inc. v. Fla. Dep’t of Revenue*, 477 U.S. 1, 8 (1986); *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981); *Mobil Oil Corp. v. Comm’r of Taxes*, 445 U.S. 425, 443 (1980); *Dep’t of Revenue v. Ass’n of Wash. Stevedoring Cos.*, 435 U.S. 734, 745–46 (1978); see also Walter Hellerstein, Michael J. McIntyre & Richard D. Pomp, *Commerce Clause Restraints on State Taxation After Jefferson Lines*, 51 TAX L. REV. 47, 49 & n.13 (1995).

151. Act of Sept. 14, 1959, Pub. L. No. 86-272, § 101, 73 Stat. 555, 555 (codified at 15 U.S.C. § 381 (2006)).

discriminates against a rail carrier,”¹⁵² and subsequent amendments forbid similar discrimination against motor carriers¹⁵³ or air carriers.¹⁵⁴ And the Internet Tax Freedom Act states that “[n]o State or political subdivision thereof may impose any . . . [t]axes on Internet access” or “[m]ultiple or discriminatory taxes on electronic commerce.”¹⁵⁵

The Supreme Court has long held that the Commerce Clause grants Congress the authority to enact these sorts of statutes—statutes regulating how states and their political subdivisions tax persons or entities engaged in interstate commerce. Consider the Court’s 1978 decision in *Moorman Manufacturing Co. v. Bair*.¹⁵⁶ At issue was Iowa’s method of apportioning the income of multistate businesses for purposes of the state’s corporate income tax.¹⁵⁷ Unlike other states, Iowa computed a taxpayer’s income attributable to Iowa based entirely on the proportion of the taxpayer’s sales to Iowa customers.¹⁵⁸ Given other states’ use of multi-factor apportionment formulas, the practical effect of Iowa’s scheme was to subject many out-of-state corporations to state-level taxation on more than one hundred percent of their income.¹⁵⁹ It also created a financial incentive for out-of-state businesses to locate their property and jobs in Iowa.¹⁶⁰

Nonetheless, the Court rejected the taxpayers’ challenge to Iowa’s scheme.¹⁶¹ The Justices did not deny that Iowa’s single-factor sales apportionment scheme effectively produced multiple taxation, or that this multiple taxation potentially discriminated against interstate commerce. Rather, the Court explained that, whatever the substantive merits of the out-of-state businesses’ complaint, Congress was the institution to solve the problem:

It is clear that the legislative power granted to Congress by the Commerce Clause of the Constitution would amply justify the enactment of legislation requiring all States to adhere to uniform rules for the division of income. It is to that body, and

152. 49 U.S.C. § 11501(b)(4) (2006).

153. *Id.* § 14502.

154. *Id.* § 40116.

155. 47 U.S.C. § 151 (2006).

156. 437 U.S. 267 (1978).

157. *Id.* at 269.

158. *See id.* at 269–70.

159. *See id.* at 284–86 & n.2 (Powell, J., dissenting).

160. *See id.* at 289.

161. *See id.* at 271–81 (majority opinion).

not this Court, that the Constitution has committed such policy decisions.¹⁶²

Or, consider the Court's 1992 decision in *Quill Corp. v. North Dakota*.¹⁶³ The question there was whether North Dakota could require out-of-state sellers lacking any "physical presence" in the state to collect use taxes on sales to North Dakota customers.¹⁶⁴ Critically, the Court had held twenty-five years earlier, in *National Bellas Hess, Inc. v. Department of Revenue*,¹⁶⁵ that the imposition of a collection obligation under these circumstances was unconstitutional.¹⁶⁶ In *Quill*, the Court overruled *Bellas Hess* to the extent it had relied on principles of due process, but it retained *Bellas Hess*'s physical presence requirement under the dormant Commerce Clause.¹⁶⁷ As in *Moorman*, the Court explained that Congress was the appropriate institution to balance the relevant considerations: "[T]he underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions."¹⁶⁸

There are several other examples, but the basic point is clear. As the leading treatise in the field sums up, "Congress possesses unquestioned power under the Commerce Clause to regulate state taxation of interstate commerce."¹⁶⁹

B. Applying the New Understanding

The Supreme Court has never explicitly discussed how federal statutes that regulate state and local taxation are compatible with the anti-commandeering principle. But synthesizing these two doctrines is relatively straightforward—or at least it was before the *Health Care Cases*.

162. *Id.* at 280. Congress, though, has yet to take up in the invitation.

163. 504 U.S. 298 (1992).

164. *See id.* at 301.

165. 386 U.S. 753 (1967).

166. *Id.* at 758.

167. *See Quill*, 504 U.S. at 306–20.

168. *Id.* at 318.

169. HELLERSTEIN & HELLERSTEIN, *supra* note 23, ¶ 4.24; *see also* Arthur R. Rosen & Jeffrey S. Reed, *The Final Word: Congress and the Express Commerce Clause*, 2007 ST. & LOC. TAX LAW. 9, 22 ("A strong line of cases clearly demonstrates that Congress has the power to regulate state taxation."); Shaviro, *supra* note 24, at 986 (stating that Congress's power to restrict state and location taxation of interstate commerce is plenary).

Again, none of these federal statutes, in express terms, requires a state or local government to impose a given tax. Instead, they effectively take the form of prohibitions. Some are flat prohibitions, and thus should be unaffected by the *Health Care Cases*. For instance, the State Taxation of Pension Income Act of 1995 provides that “[n]o State may impose an income tax on any retirement income of an individual who is not a resident or domiciliary of such State (as determined under the laws of such State).”¹⁷⁰ But other federal statutes operate as conditional prohibitions; they give states a choice between (1) taxing according to Congress’s terms, or (2) having their tax schemes preempted. Consider the Mobile Telecommunications Sourcing Act (“MTSA”).¹⁷¹ It provides, in relevant part, that, “[n]otwithstanding the law of any State or political subdivision of any State, mobile telecommunications services provided in a taxing jurisdiction to a customer, the charges for which are billed by or for the customer’s home service provider, shall be deemed to be provided by the customer’s home service provider.”¹⁷² The MTSA does not *force* the states to tax mobile communications. But if they choose to do so, they must affirmatively implement the specific sourcing rules prescribed by Congress.

Before the *Health Care Cases*, all federal statutes regulating state and local taxation—whether taking the form of a flat prohibition or a conditioned choice—could be conceptualized as forms of preemption. They effectively nullify (or preempt) state or local taxes failing to conform to a particular federal norm. As with federal laws preempting other forms of state regulation, those regulating state and local taxation always afford state and local governments the formal option to step aside and do nothing at all. A state that does not like the MTSA’s sourcing rules, for instance, can decide not to tax mobile telecommunication services. In this way, Congress has not commanded the states to take any affirmative acts, and the federal statutes would not be understood as commandeering.

As should now be clear, the *Health Care Cases* upend this understanding, at least with respect to federal statutes taking the form of conditional prohibitions. To repeat, the *ratio decidendi* of the Court’s Medicaid holding is that any federal law regulating the conduct of the states that does not offer the states a genuine choice but to comply with Congress’s conditions must be understood as a

170. 4 U.S.C. § 114 (2006).

171. Pub. L. No. 106-252, § 116, 114 Stat. 626, 626-27 (2000) (codified at 42 U.S.C. § 116-126 (2006)).

172. 4 U.S.C. § 117(a) (2006).

federal command. This means that, if Congress conditionally preempts a state tax by prescribing the terms on which that tax must be imposed (lest it be preempted)—and the state practically has “no option” but to continue imposing that tax—the federal law will constitute a commandeering.

Consider, for example, a federal statute regulating the states’ division of income for purposes of business activity taxes (such as corporate income taxes), precisely the type of law contemplated by the Court in *Moorman*. Such a statute would generally consist of the following: (1) a prescription of uniform rules for the apportionment of business income (i.e., income earned in the ordinary operation of the enterprise); (2) definitions of the factors—such as sales, property, and payroll—that form the prescribed formula; and (3) a set of rules for allocating businesses’ non-business income (i.e., non-operational, investment income).¹⁷³ Now assume, reasonably enough, that several states depend heavily on their business activity tax revenue—perhaps that this revenue (much like federal Medicaid reimbursements) constitutes close to ten percent of their annual budgets. The logic of the *Health Care Cases* dictates that the states may have no “genuine choice” but to continue imposing their business activity taxes. As a result, Congress’s prescriptions as to how states are to apportion business income, define the relevant apportionment factors, and allocate non-business income would all constitute federal commands—commands forcing states to act affirmatively in their sovereign capacities. As such, the precise sort of federal law endorsed by the Court in *Moorman* would constitute a commandeering.

Or suppose Congress enacted a statute similar to that contemplated by the Streamlined Sales and Use Tax Agreement (“SSUTA”),¹⁷⁴ a plan collectively developed over the past decade by state tax administrators and other stakeholders.¹⁷⁵ Such a law would require states imposing sales and use taxes to implement and enforce a variety of provisions, such as (1) greater uniformity in the applicable tax rate;¹⁷⁶ (2) state-level uniformity in the tax base;¹⁷⁷ (3) uniform

173. Cf. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 278–79 (1978) (discussing the various details such a hypothetical statute would need to address in order to prevent multiple taxation).

174. STREAMLINED SALES & USE TAX AGREEMENT (amended May 24, 2012), <http://www.streamlinedsalestax.org/uploads/downloads/Archive/SSUTA/SSUTA%20As%20Amended%205-24-12.pdf>.

175. See John A. Swain, *State Sales and Use Tax Jurisdiction: An Economic Nexus Standard for the Twenty-First Century*, 38 GA. L. REV. 343, 371–72 (2003).

176. STREAMLINED SALES & USE TAX AGREEMENT, *supra* note 174, § 308.

177. See *id.* § 302.

rules for determining where covered transactions occur;¹⁷⁸ and (4) uniform definitions of items commonly exempted from sales taxes (such as groceries and medical supplies).¹⁷⁹ Again, many states that currently impose sales and use taxes might well find it practically impossible to forego the revenue those taxes generate. As a result, a federal law requiring the states to conform their sales tax schemes to the basic provisions of the SSUTA would, under the rationale of the *Health Care Cases*, amount to a command. Because that command would force the states to affirmatively govern according to Congress's instructions, it would amount to a commandeering.

These are just two possibilities. The larger point is that, whenever a state depends significantly on the revenue a given tax generates, a federal law prescribing the terms on which that tax can be implemented is now constitutionally suspect. The federal statute must afford the states a true choice, not just "in theory" but "in fact."

C. *Taxation and Governance*

Conceivably, one might argue that *taxing* is not really *governing*, such that federal laws dictating how states are to implement their tax schemes fall outside the ambit of the anti-commandeering principle. But that seems implausible.

First, the essence of the constitutional prohibition on commandeering—the precise reason commandeering violates the structural principles of federalism, according to the Court—is that Congress lacks the authority to direct state governments how to affirmatively exercise their sovereign powers over their own citizens.¹⁸⁰ Taxing is no less essential an aspect of a sovereign's authority than regulating or spending. In the Court's own words, "[t]he power of a state to tax" is "basic to its sovereignty,"¹⁸¹ an authority that is "fundamental and delicate."¹⁸² Thus, the choices a state makes with respect to its tax system would seem just as central to public governance as those concerning its regulatory or social welfare programs.

178. *See id.* §§ 309–315.

179. *See id.* § 316.

180. *See New York v. United States*, 505 U.S. 144, 161 (1992) ("As an initial matter, Congress may not simply 'commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.' " (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981))).

181. *Bode v. Barrett*, 344 U.S. 583, 585 (1953).

182. *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990).

Second, the Court has articulated two basic rationales for the anti-commandeering principle: (1) the Framers of the Constitution quite deliberately chose to confer on Congress the authority to govern the people directly, rather than through the machinery of the states (a system that had proved unworkable under the Articles of Confederation);¹⁸³ and (2) state laws or executive actions that are dictated by Congress blur the relevant lines of political accountability, leaving citizens unable to discern which elected officials are responsible for a given policy.¹⁸⁴ These underlying rationales apply with just as much force to federal mandates that compel the states to tax in certain ways as they do to laws that dictate specific forms of regulation or spending. Thus, if implementing a spending program that provides health insurance to the indigent and disabled qualifies as governing under the anti-commandeering doctrine—as the Court concluded in the *Health Care Cases*—so should the imposition of taxes. Indeed, a state's prerogative to determine how it will generate revenue arguably falls even closer to the core of its sovereignty than the discretion to decide how to distribute a benefit like health coverage, especially when more than half the funding for that benefit comes from the federal government.

D. Some Practical Consequences

The example of federal statutes that regulate state and local taxation serves not just to illustrate how the *Health Care Cases* have altered the contours of the anti-commandeering principle. It also reveals an unfortunate (and likely unintended) consequence of the Court's decision: it may seriously fetter Congress's authority to address the many problems plaguing the nation's state and local tax system. And as the Court itself has often acknowledged, Congress is much better situated than the judiciary to devise solutions to these complex problems.

Complications of measurement make it impossible to know for certain, but it is likely that state and local tax schemes impose billions of dollars in needless costs on the United States economy. Consider the following four pathologies, all of which are largely endemic to our federal structure.

183. See *New York*, 505 U.S. at 161–67.

184. See *id.* at 168–69.

1. Disadvantaging Interstate Commerce

State governments have an inherent political incentive to design their tax systems to provide competitive advantages to in-state taxpayers and to maximize the economic incidence of their taxes on out-of-state taxpayers. Of course, the judicial enforcement of the dormant Commerce Clause can stymie blatant forms of such discrimination. But subtler practices—the single-factor apportionment of business income at issue in *Moorman*, for example, or the common game of imposing higher sales tax rates on hotels and rental cars¹⁸⁵—routinely disadvantage commerce that crosses state lines. This tax favoritism is inefficient; it reduces the aggregate social gains from trade by favoring higher-cost, local businesses at the expense of more efficient, out-of-state firms.

2. Locational Distortions

Relatedly, state tax schemes (again, like the single-factor apportionment formula at issue in *Moorman*) tend to distort taxpayers' locational decisions, inducing firms to locate their facilities and jobs in particular jurisdictions. This, too, results in deadweight loss, as it induces behavior not because of its underlying economic sense but purely due to its tax consequences. Of course, many of these locational distortions are unavoidable, given that states have broad discretion to pursue differing tax policies. But federal legislation can constrain that discretion in constructive ways, and thereby reduce the size of these distortions.

3. Undertaxation and the Underproduction of Public Goods

Presently, state and local governments have a strong incentive to compete with one another for mobile taxpayers—specifically, business enterprises and affluent individuals. Under the right conditions, this competition can be healthy for the economy. But because the states are generally incapable of coordinating their tax policies, they cannot bind each other to any ground rules to govern their tax competition. This collective action problem can create a sort

185. See, e.g., Logan E. Gans, *Take Me out to the Ballgame, but Should the Crowd's Taxes Pay for It?*, 29 VA. TAX REV. 751, 767 (2010) (discussing the phenomenon in connection with the public financing of sports stadiums); Jack F. Williams, Jessica O'Quin & Joshua Stein, *Public Financing of Green Cathedrals*, 5 ALB. GOV'T L. REV. 123, 135 (2012) (same).

of prisoner's dilemma,¹⁸⁶ in which the states are apt to tax mobile taxpayers more lightly than they sincerely prefer.¹⁸⁷ As a result, the states may well collect a less-than-optimal amount of revenue, and consequently produce a suboptimal level of public goods (such as education, health care, and police protection).

4. Planning and Compliance Costs

Finally, non-uniform state and local taxes—the varying schemes, rules, and definitions splayed out across more than 7,500 distinct taxing jurisdictions¹⁸⁸—force taxpayers to devote substantial resources to tax planning and compliance.¹⁸⁹ The present level of non-uniformity requires taxpayers to maintain a working knowledge of hundreds of different tax regimes; engage in multiple, overlapping calculations of their liabilities; maintain separate sets of records (given the varying definitions of salient tax attributes, such as basis); and file hundreds (if not thousands) of different forms.¹⁹⁰ It also encourages taxpayers to engage the assistance of lawyers, accountants, and consultants to devise sophisticated tax minimization strategies. To be sure, every tax system entails planning and compliance costs. But the number and heterogeneity of taxing jurisdictions in the United States increases those costs exponentially.

* * *

In short, the negative wealth effects attributable to the state and local tax system—caused by the states' strategic behavior, state-level collective action problems, and the non-uniformity of state and local tax regimes—are likely substantial. It is therefore unsurprising that Congress has considered several measures to regulate state and local taxes in recent years. Proposed legislation includes the Business Activity Tax Simplification Act, which would clarify when states have jurisdiction to impose income taxes on out-of-state firms;¹⁹¹ the

186. See DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, *GAME THEORY AND THE LAW* 33 (1994) (explaining the basic mechanics of the collective action problem commonly referred to as a prisoner's dilemma).

187. See William F. Fox & John A. Swain, *The Federal Role in State Taxation: A Normative Approach*, 60 NAT'L TAX J. 611, 615 (2007).

188. See *Sales Tax Fairness and Simplification Act: Hearing on H.R. 3396 Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 11 (2007) (statement of Rep. Zoe Lofgren, Member, H. Subcomm. On Commercial and Admin. Law).

189. See Shaviro, *supra* note 24, at 919–27.

190. See *id.*

191. H.R. 1083, 111th Cong. (2009).

Mobile Workforce State Income Tax Fairness and Simplification Act, which would specify rules governing state jurisdiction to tax the income of individuals performing services in more than one state;¹⁹² the Telecommuter Tax Fairness Act, which would define the circumstances under which a state could tax the income of an individual whose professional office address is located in the taxing state, but who performs her work at home in another state;¹⁹³ and the Sales Tax Fairness and Simplification Act, which would grant Congress's consent to the terms of the SSUTA.¹⁹⁴

The logic of the *Health Care Cases*, however, means that some of these proposals may be unconstitutional. Indeed, by expanding the breadth of the anti-commandeering principle, the Court may have disempowered Congress from enacting any legislation prescribing the terms on which states can implement taxes on which they currently rely heavily. This could be quite unfortunate, for as the Justices have frequently acknowledged, Congress is much better suited than the courts to address these complicated problems of tax policy.¹⁹⁵ As Justice Black cogently observed more than sixty years ago in *McCarroll v. Dixie Greyhound Lines, Inc.*,¹⁹⁶

Congress alone can, in the exercise of its plenary constitutional control over interstate commerce, not only consider whether such a tax as now under scrutiny is consistent with the best interests of our national economy, but can also on the basis of full exploration of the many aspects of a complicated problem devise a national policy fair alike to the States and our Union.¹⁹⁷

To be sure, Congress's solutions will not be perfect. But as a matter of comparative institutional competence, Congress is better positioned than the judiciary to devise detailed, prospective rules that are tailored to the intricacies of state and local taxation.

192. H.R. 2110, 111th Cong. (2009).

193. H.R. 2600, 111th Cong. (2009).

194. H.R. 3396, 110th Cong. (2007).

195. Indeed, unless Congress repeals the Tax Injunction Act, 28 U.S.C. § 1341 (2006), which precludes lower federal court jurisdiction over most state tax disputes, the Supreme Court could be the *only* national institution capable of engaging in this endeavor.

196. 309 U.S. 176 (1940).

197. *Id.* at 189 (Black, J., dissenting); see also *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 637–38 (1981) (White, J., concurring) (stating that Congress has the power to regulate state taxation so as to protect from burdens on interstate commerce); *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 476 (1959) (Frankfurter, J., dissenting) (“Congress alone can provide for a full and thorough canvassing of the multitudinous and intricate factors which compose the problem of the taxing freedom of the States and the needed limits on such state taxing power.”).

CONCLUSION

The Supreme Court's decision in the *Health Care Cases* was hugely important, and its consequences are likely to reverberate for years. One of those consequences is that the Court effectively reconceptualized what constitutes a federal command to the states. Regardless of the legislative authority Congress has invoked, a federal law leaving the states no "genuine choice" but to accede to Congress's conditions must now be understood as a command. And if that command requires the states to act affirmatively in their sovereign capacities, it amounts to an unconstitutional commandeering.

It is unclear how many federal laws might be jeopardized by this new conceptualization. The answer largely depends on the sorts of practical circumstances leading the Court to conclude that the states lack a "legitimate choice" or "real option." But one place this new understanding will plainly matter is in assessing the constitutionality of federal laws that regulate state and local taxation. If a state relies heavily on a particular tax, the *Health Care Cases* suggest that a federal statute prescribing the manner in which that tax is to be imposed must be understood as a command, and thus a commandeering.

There is some irony here. Several commentators have criticized the Court's decision for unjustifiably expanding the government's authority to tax, pointing to the opinion's broad construction of Congress's taxing power in sustaining the ACA's minimum coverage provision.¹⁹⁸ These critics may be right, but perhaps not for the reason they have supposed. The more acute tax problem created by the Court's holding may instead involve those levies imposed by state and

198. See, e.g., John Yoo, *Chief Justice Roberts and His Apologists*, WALL ST. J., June 30, 2012, at A15; Robert Alt, *Twisting a Statute Is Better than Twisting the Constitution*, SCOTUSBLOG (June 28, 2012, 6:27 PM), <http://www.scotusblog.com/2012/06/twisting-a-statute-is-better-than-twisting-the-constitution/>; Epstein, *supra* note 6; Rick Hills, *The Healthcare Decision and the Revival of the Taxing Power: The Costs and Benefits of Formalism in Federalism*, PRAWFSBLAWG (June 28, 2012, 11:03 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2012/06/the-healthcare-decision-and-the-costs-and-benefits-of-formalism-in-federalism.html#more>; Clark Neily, *Unintended Consequences*, SCOTUSBLOG (June 29, 2012, 9:54 AM), <http://www.scotusblog.com/2012/06/unintended-consequences/>; Paulsen, *supra* note 6; Ilya Somin, *A Taxing, but Potentially Hopeful Decision*, SCOTUSBLOG (June 28, 2012, 6:13 PM), <http://www.scotusblog.com/2012/06/a-taxing-but-potentially-hopeful-decision/>; Ilya Somin, *An Unpersuasive Majority Ruling on Obamacare*, N.Y. DAILY NEWS (June 28, 2012, 2:39 PM), <http://www.nydailynews.com/opinion/unpersuasive-majority-ruling-obamacare-article-1.1104052?print>.

local governments, levies that Congress may have difficulty regulating under the Court's new conception of commandeering.